U.S. Department of Homeland Security
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U.S. Citizenship and Immigration Services

PUBLIC COPY

[redacted]

FILE: [redacted] Office: PORTLAND Date: JUN 09 2008

MSC 06 101 25463

IN RE: Applicant: [redacted]

APPLICATION: Application for Status as a Temporary Resident pursuant to Section 245A of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1255a

ON BEHALF OF APPLICANT:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. The file has been returned to the office that originally decided your case. If your appeal was sustained, or if your case was remanded for further action, you will be contacted. If your appeal was dismissed, you no longer have a case pending before this office, and you are not entitled to file a motion to reopen or reconsider your case.

for Michael T. Kelley
Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The application for temporary resident status pursuant to the terms of the settlement agreements reached in *Catholic Social Services, Inc., et al., v. Ridge, et al.,* CIV. NO. S-86-1343-LKK (E.D. Cal) January 23, 2004, and *Felicity Mary Newman, et al., v. United States Immigration and Citizenship Services, et al.,* CIV. NO. 87-4757-WDK (C.D. Cal) February 17, 2004 (CSS/Newman Settlement Agreements), was denied by the District Director, New York. The decision is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant submitted a Form I-687, Application for Status as a Temporary Resident Under Section 245A of the Immigration and Nationality Act (Act), and a Form I-687 Supplement, CSS/Newman Class Membership Worksheet, on January 9, 2006. On March 29, 2006, the director issued a Notice of Intent to Deny (NOID) the application. The record contains affidavits and other information that appear to have been submitted in response to the NOID. The applicant was interviewed on July 18, 2006. Upon review of the totality of the evidence, the director denied the application on September 29, 2006. The director determined that the applicant had not established that she had resided continuously in the United States during the required statutory period. On appeal, counsel for the applicant asserts the applicant entered the United States in March 1981 with her common-law husband and remained in the United States except for two absences in 1985 and 1987.

An applicant for temporary resident status must establish entry into the United States before January 1, 1982, and continuous residence in the United States in an unlawful status since such date and through the date the applicant attempted to file the application. Section 245A(a)(2) of the Act, 8 U.S.C. § 1255a(a)(2). The applicant must also establish that he or she has been continuously physically present in the United States since November 6, 1986. Section 245A(a)(3) of the Act, 8 U.S.C. § 1255a(a)(3). The regulations clarify that the applicant must have been physically present in the United States from November 6, 1986 until the date of filing or attempting to file the application. 8 C.F.R. § 245a.2(b)(1).

Under the CSS/Newman Settlement Agreements, for purposes of establishing residence and physical presence, in accordance with the regulation at 8 C.F.R. § 245a.2(b)(1), "until the date of filing" shall mean until the date the applicant attempted to file a completed Form I-687 application and fee or was caused not to timely file during the original legalization application period of May 5, 1987 to May 4, 1988. CSS Settlement Agreement paragraph 11 at page 6; Newman Settlement Agreement paragraph 11 at page 10.

The applicant shall be regarded as having resided continuously in the United States if, at the time of filing no single absence from the United States has exceeded forty-five (45) days, and the aggregate of all absences has not exceeded one hundred eighty (180) days during the requisite period, unless the applicant can establish that due to emergent reasons, his or her return to the United States could not be accomplished within the time period allowed. 8 C.F.R. § 245a.2(h)(1)(i).

The applicant has the burden of proving by a preponderance of the evidence that he or she has resided in the United States for the requisite periods, is admissible to the United States under the provisions of section 245A of the Act, and is otherwise eligible for adjustment of status. The inference to be drawn from the documentation provided shall depend on the extent of the documentation, its credibility and amenability to verification. 8 C.F.R. § 245a.2(d)(5).

Although the regulation at 8 C.F.R. § 245a.2(d)(3) provides an illustrative list of contemporaneous documents that an applicant may submit in support of his or her claim of continuous residence in the United States in an unlawful status since prior to January 1, 1982, the submission of any other relevant document is permitted pursuant to 8 C.F.R. § 245a.2(d)(3)(vi)(L).

The "preponderance of the evidence" standard requires that the evidence demonstrate that the applicant's claim is "probably true," where the determination of "truth" is made based on the factual circumstances of each individual case. *Matter of E-M-,* 20 I&N Dec. 77, 79-80 (Comm. 1989). In evaluating the evidence, *Matter of E-M-* also stated that "[t]ruth is to be determined not by the quantity of evidence alone but by its quality." *Id.*at 80. Thus, in adjudicating the application pursuant to the preponderance of the evidence standard, the director must examine each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true. *See* 8 C.F.R. § 245a.2(d)(6).

Even if the director has some doubt as to the truth, if the applicant submits relevant, probative, and credible evidence that leads the director to believe that the claim is "probably true" or "more likely than not," the applicant or petitioner has satisfied the standard of proof. See *U.S. v. Cardozo-Fonseca*, 480 U.S. 421 (1987) (defining "more likely than not" as a greater than 50 percent probability of something occurring). If the director can articulate a material doubt, it is appropriate for the director to either request additional evidence or, if that doubt leads the director to believe that the claim is probably not true, deny the application or petition.

The issue in this proceeding is whether the applicant has furnished sufficient credible evidence to establish her entry into the United States prior to January 1, 1982 and continuous unlawful residence since such date through the date she attempted to file the application.

The record in this matter contains a Form I-687 submitted on or about May 6, 1990. On the May 6, 1990 Form I-687, the applicant listed her addresses for the pertinent time period as [redacted] Burbank, California from April 1981 to August 1987 and [redacted] Burbank, California from August 1987 to January 1990. The applicant also indicated that she had left the United States on three occasions: (1) from November 13, 1985 to December 15, 1985 to give birth; (2) from April 5, 1987 to May 12, 1987 to give birth; and (3) from August 20, 1987 to September 22, 1987 for a family visit. The applicant also noted that she was self-employed as a housekeeper from April 1981 to the date the application was signed.

The Form I-687 filed January 9, 2006 indicates the applicant lived on Fairview in Burbank, California from March 1981 to May 1987 and on Niagara in Burbank from June 1987 to January 1990. The Form I-687 lists two absences from the United States: (1) from October 1985 to May 1986 to give birth; and (2) from February 1987 to June 1987 to give birth.

In addition to the Forms I-687, the record contains several affidavits and letters regarding the applicant's presence in the United States during the pertinent time period:

- A May 6, 1990 affidavit signed by [redacted] later identified as the applicant's common law husband, who declared that he knew for a fact that the applicant had left the United States on August 20, 1987 and re-entered the United States illegally on September 22, 1987; an April 29, 2006 letter also signed by [redacted] stating that although he and the applicant never married they lived together for 26 years and raised a family, that (1) they crossed the border into the United States in March 1981, (2) they lived in Burbank and Pacolma, [sic] California for 18 years until moving to Oregon, and (3) the applicant only left the United States twice, once in October 1985 returning in March 1986 and the second time in February 1987 returning in June 1987.

- An August 21, 1990 affidavit signed by [redacted] who states that she resides at [redacted]. Burbank, California and that [redacted] [sic] resided at the same address from April 1981 to August 1987 as a co-tenant; a second affidavit signed by [redacted], dated August 21, 1990 stating that she is a housewife and met the applicant in April 1981 when the applicant came to live in the same apartment building where the affiant lived. [redacted] stated further that the longest period of time she had not seen the applicant is one month.

- An August 21, 1990 affidavit signed by [redacted], manager, who states that she resides at [redacted], Burbank, California and that [redacted] resided at the same address from August 1987 to January 1990; a second affidavit signed by [redacted] dated August 21, 1990 stating that she is a production/laborer declaring that she met the applicant 16 years ago in Mexico, then on 1981 when the applicant came to the "U.E." she and the applicant contacted each other and in 1987 the applicant moved into the building the affiant managed. [redacted] stated further that the longest period of time she had not seen the applicant is one month.

- An August 23, 1990 affidavit signed by [redacted] declaring that he had known the applicant since the early part of 1981.

- The record also contains the birth certificates of the two children born in Mexico and their 1996 school immunization records showing one child's first immunization on March 22, 1986 and the second child's first immunization on June 15, 1987.

On appeal counsel asserts that the applicant's two absences from the United States for more than 45 days each time and for more than 180 days in the aggregate was due to emergent reasons. Counsel references a website printout from the U.S. Department of Health and Human Services, www.hrsa.gov, for the State of Oregon indicating that labor and delivery services are considered emergencies. Counsel also notes that the Family and Medical Leave Act provides that an eligible employee is entitled to 12 workweeks of leave for the birth of a child and to care for the child.

The AAO has reviewed the documentation submitted and observes the following deficiencies and inconsistencies. The applicant's common law husband's affidavits are inconsistent in that in Mr. [redacted]s first affidavit he declares that the applicant left the United States in August 20, 1987 and re-entered the United States illegally on September 22, 1987; and in the second affidavit declares that the applicant only left the United States twice, once in October 1985 returning in March 1986 and the second time in February 1987 returning in June 1987. The affidavits provided by [redacted] and [redacted] are inconsistent with the applicant's testimony as well as [redacted]s statement in that they declare the longest time they have not seen the applicant is one month. In addition, the affidavits of Ms. [redacted], and [redacted] do not provide the details describing how they met the applicant and the events and circumstances surrounding their relationship and subsequent interactions with the applicant. Further, the affiants do not provide proof they were in the United States during the requisite time period. These affidavits lack probative value in establishing the applicant's continuous unlawful residence in the United States for the requisite time period.

Moreover, the applicant has not resided continuously in the United States for the requisite period, as two of her admitted absences exceed 45 days as well as in the aggregate exceeding 180 days. The AAO acknowledges counsel's assertions that giving birth to a child outside the United States is an emergent reason. However, giving birth to a child outside the United States is not considered to be an emergent reason for any delay in returning. In *Ruginski v. INS*, 942 F.2d 13 (1ST Cir. 1991), the court upheld the determination by the Immigration and Naturalization Service that a person who gave birth abroad and remained beyond the 45 days was not qualified for temporary resident status under section 245A of the Act.

These deficient and inconsistent affidavits and documents comprise the only evidence of the applicant's residence in the United States from prior to January 1, 1982 through the requisite time period. The statements and affidavits lack credibility and probative value for the reasons noted. The absence of credible and probative documentation to corroborate the applicant's claim of continuous residence for the entire requisite period seriously detracts from the credibility of her claim. Pursuant to 8 C.F.R. § 245a.2(d)(5), the inference to be drawn from the documentation provided shall depend on the extent of the documentation, its credibility and amenability to verification. Given the lack of credible supporting documentation, it is concluded that the applicant has failed to establish by a preponderance of the evidence that she has continuously resided in an unlawful status in the United States for the requisite period as required under both 8 C.F.R. § 245a.2(d)(5) and *Matter of E- M--, supra*. Furthermore, the applicant's admitted absences break her claimed continuous residence. The applicant is, therefore, ineligible for temporary resident status under section 245A of the Act on this basis. The appeal will be dismissed.

ORDER: The appeal is dismissed. This decision constitutes a final notice of ineligibility.